United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2191

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No. 74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER SKIPPER, Individually and on Behalf of All Similarly Situated Non-Supervisory Female Employees of American Telephone and Telegraph Company, Long Lines Department,

Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Statement

Plaintiffs-Appellants Communications Workers of America and Esther Skipper ("Appellants" herein) submit this Brief in Reply to the Brief of Defendant-Appellee American Telephone & Telegraph Company, Long Lines Department ("Long Lines" herein). References will be made to materials presented in various briefs *Amicus Curiae* submitted on behalf of Appellants as follows: Equal Employment Opportunity Commission ("EEOC Brief"); New York State Division of Human Rights ("Human Rights

Brief"); Bellamy, Blank, Goodman, Kelly & Stanley ("Bellamy Brief"); International Union of Electrical, Radio & Machine Workers, Women's Equity Action League & Human Rights for Women, Inc., and United Electrical, Radio & Machine Workers of America ("IUE Brief") and New York Civil Liberties Union ("NYCL Brief"). A brief *Amicus Curiae* was submitted by 24 domestic and international U.S. airlines on behalf of Long Lines ("Airlines' Brief").

ARGUMENT

Introduction[1]

1. The characterization of the "facts" of this case by Long Lines and the Airlines requires comment. The extensive discussion of the facts involved in this Title VII action in Appellants' Brief, pp. 4-9, are not disputed by Long Lines; rather they are characterized as "not germane", "extraneous" and "irrelevant" (Long Lines Brief, p. 5). There is no question that Long Lines classifies women disabled by pregnancy under its leave policies rather than as eligible for disability benefits.[2] To characterize its leave policies relating to maternity as "not germane" is to ask this Court to ignore the facts which so clearly demonstrate the difference between this action and the case decided by the Supreme Court in *Geduldig* v. *Aiello*, 94 S. Ct. 2485 (1974) ("*Aiello*" herein), and the reasons why Long Lines policies *are* prohibited sex discrimination under Title VII of the

1. This introductory statement is treated as part of Appellants' Argument in order to correspond to the order in which Long Lines has structured its Brief.

2. Disability *benefits* are not limited to financial protection in the form of disability *payments* but include the retention of seniority and wage progression credit, vacation eligibility, insurance coverage, further disability protection, and reinstatement (76a, 85a-90a, 107a-111a, 143a-152a, 280a-283a).

Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* ("Title VII" or "the Act" herein).

The nature and operation of an employer's policies must always be fully examined before an informed decision can be made as to their legality, yet Long Lines would have this Court believe that the Title VII challenge here relates solely to its refusal to make income protection payments to its female employees disabled by pregnancy. Although such a characterization might appear more closely related to the challenge made to California's refusal to pay disability insurance for conditions attendant to pregnancy, it is inaccurate and misleading. Long Lines' policies are far broader because they limit a variety of employment rights, benefits and privileges of women temporarily disabled by pregnancy (19a). Long Lines' classification of women disabled by pregnancy under leave policies rather than under disability policies is precisely what causes them to suffer the impairment of seniority, disability entitlement, insurance coverage, wage progression credit and possible termination and discharge described by Appellants at pp. 4-9 of their Brief.

2. Long Lines further suggests that the facts set forth in Appellants' Brief are not relevant insofar as they "are drawn largely from discovery materials in a different case"[3] as well as the Copus Report (185a-288a) (Long Lines' Brief, p. 5).[4] However, the facts relating to the

3. *Communications Workers of America, et al.* v. *New York Telephone Co., et al.*, Civ. Action No. 74-3352 H.R.T.

4. The Copus Report findings were based upon a Special Task Force Study of A.T.&T.'s employment practices. Summaries of over 20,000 pages of documents were prepared by EEOC for submission in F.C.C. Docket No. 19143. AT&T disagreed with those summaries and after extensive discussions and negotiations by respective counsel, AT&T prepared its own summaries. Both sets of summaries are part of the F.C.C. Docket Record as Exhibit 1-C and 20, respectively. Because of the entry of the Consent Decree, *no* ruling was required to be made on the admissibility or non-admissibility of the summaries. (See, e.g. T.148, 208, 239, 8186-8199).

impact of Long Lines' policies upon the rights, benefits, terms and conditions of employment set forth in Appellants' Brief at pp. 7-8 are derived from discovery materials submitted in this action and reproduced in the Appendix. Further, Long Lines cannot ignore the fact that Therese Pick, Secretary of AT&T's Employee Benefits Committee, acknowledged that the Plan governing treatment of disabled employees is in effect for *all* companies (164a), and the fact that its treatment of women disabled by pregnancy is uniform in its impact upon these female employees for its operating companies and departments. (*Compare*, e.g., Testimony and Responses of Daniel J. Culkin on behalf of Long Lines before the F.C.C. (142a-152a) and letter and data submitted by Lee Satterfield to the O.F.C.C. on behalf of the Bell System, including Long Lines (118a-137a).)

3. The Airlines' Brief, pp. 30-32, sets forth certain matters relating to costs and anticipated non-return rates of women following maternity leaves, taking the novel position that such factors are sufficient to justify Long Lines' policies while at the same time arguing that justifications are not required.[5] However, the Court below did not consider any of these factors, nor did Long Lines submit any data on actual *costs* of present coverage. The absence below of *cost* figures (rather than percentages of days absent) noted in Appellants' Brief renders such an argument devoid of significance. The *Amici Curiae* who submitted briefs on behalf of Appellants have demonstrated that an employer's alleged costs alone must not be permitted

5. *Compare* Airlines' Brief, pp. 9, 11 with pp. 30-32. Long Lines Brief similarly states that questions of justification "are not presented by this appeal" (pp. 4-5). The Airlines' discussion (p. 15) of the alleged higher "premiums" which would result from coverage of pregnancy demonstrates their lack of knowledge of the facts of this case. A.T. & T. does not use an insurance carrier to cover benefits paid to disabled employees, but regards benefit payments as an operating expense of the Company (89a).

to overshadow the real issues here—can an employer deny to a group of female employees the full privileges, protections and benefits which are routinely granted to its male employees, merely by arguing that full equality may cost more than preserving the status quo of differential treatment? (See, e.g., Bellamy Brief, pp. 12, 14-17; NYCL Brief, pp. 11-15; EEOC Brief, pp. 31-37; IUE Brief, pp. 28-33). If our commitment to equal employment unrestricted by sexual stereotypes is to be met, costs cannot occupy the role claimed by the Airlines. This is why costs are *not* considered a defense to Title VII employment discrimination,[6] absent "irresistable demand". *U.S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971). As noted in Appellants' Brief, pp. 22-25, Long Lines' financial situation hardly meets this standard.

4. Arguments that pregnancy is voluntary, that pregnant women would abuse disability coverage, or that the pregnant employee can plan for the financial impact of disability (see Airlines' Brief, p. 32), have been discredited by the several district courts which have found disparate treatment of women disabled by pregnancy to be violative of Title VII. Thus, Judge Merhige found in *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367, 377, 381-382, (E.D. Va. 1974) that "while pregnancy is perhaps most often voluntary, *a substantial incidence of negligent or accidental conception also occurs.*" Long Lines' coverage of "voluntary" conditions such as cosmetic surgery, vasectomy, suicide attempts, alcoholism and drug abuse renders this argument ineffectual (165a-179a). *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F. Supp. 1146, 1164 (W.D. Pa. 1974), specifically rejected any contention that women

6. Significantly, Long Lines does not devote any substantial space to such an argument (see Long Lines Brief, pp. 15-16), recognizing, no doubt, that such a position entails the substantial factual development foreclosed by the decision below.

would abuse income protection for pregnancy disability, after noting that pregnancy disability is easily determined:

> . . . as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex.

The suggestion that economic burdens of disability due to pregnancy and childbirth can be planned for in advance does not, even if true,[7] explain why that requires that these disabilities be considered different from those relating, for example, to cosmetic surgery.

POINT I

Aiello did not decide, independent of its factual and legal context, that failure to classify pregnancy as a disability does not constitute discrimination on the basis of sex.

1. Long Lines describes the *Aiello* finding that California's objectives in establishing a disability insurance program justified excluding coverage of pregnancy as a conclusion independent from an "explicit" holding that the exclusion did not constitute sex discrimination. (Long Lines Brief, p. 6) Not only does *Aiello* contain no such "explicit" holding, but the Court repeatedly describes what

7. The more realistic view of the economic burdens facing women disabled by pregnancy is discussed in IUE Brief, pp. 2, 13-14; NYCL Brief, pp. 10-11; Bellamy Brief, pp. 13-18; EEOC Brief, pp. 24-25; and in Appellants' Brief, pp. 33-34.

it is doing in terms of determining the legitimacy of California's objectives:

> The *essential issue* in this case is whether the Equal Protection Clause requires [California's] policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery. (94 S. Ct. at 2491; emphasis added)

Following the submission of Appellants' Brief on October 31, 1974, two district courts had occasion to consider —and reject—the very interpretation Long Lines urges herein. *Vineyard* v. *Hollister School District*, 8 FEP Cases 1009, 1012 (N. D. Calif. 1974)[8] specifically held that a challenge to maternity leave and disability benefits exclusion of pregnancy disabilities arising under Title VII involved a "different analytical framework than the Fourteenth Amendment claims which confronted the Court in Geduldig." The Court recognized the correct view of what *Aiello* did and did not do when it noted:

> In Geduldig pregnancy disability was exempted from coverage in an effort to maintain disability fund contributions at the one percent level. *In balancing the state's goals of maintaining a low contribution rate against the exclusion of normal pregnancies from coverage, the Court found that the state's rationale justified the exclusion* and that the classification of pregnant women did not constitute

8. It is significant that this decision comes out of the very same District in which *Aiello* arose.

> invidious discrimination under the Fourteenth Amendment.[9] (emphasis added)

Similarly, in *Satty* v. *Nashville Gas Company*, No. 74-288-NA-CV (M.D. Tenn., Nov. 4, 1974), the Court noted that in *Aiello*

> . . . the *sole* question presented was whether classifications under a disability insurance program established and administered under the laws of California violated the Equal Protection Clause of the Fourteenth Amendment. . . . The standard applied by the Court to test the constitutional question was one of "reasonableness". . . . In finding a rational basis for the exclusion of normal pregnancies under the California disability insurance program, the Court noted several factors relating to the fiscal soundness of the program which were found sufficient. (emphasis added; slip opinion, pp. 6-7)

The *Satty* opinion is particularly significant because it points out dramatically the fact that *employment* practices, which were not involved in *Aiello*, are governed by different standards under Title VII than the Fourteenth Amendment, and describes the impact of practices substantially like Long Lines' involving the classification of pregnant employees under leave policies which affected their seniority and consequent ability to bid upon permanent job

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9. *Compare,* 94 S. Ct. 2489-2490: "[T]he issue before the Court on this appeal is whether the California disability insurance program *invidiously discriminates* against Jaramillo and others similarly situated by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth." After carefully examining California's objectives in excluding pregnancy, the Court holds that California's policies "provide an objective and wholly *non-invidious* basis for the state's decision not to create a more comprehensive insurance program than it has," 94 S. Ct. at 2492. (Emphasis added.)

openings following leave.[10] The Court found such a classification to be sex discrimination in violation of Title VII, slip opinion, pp. 3-11.

In view of the various distinctions between this case and *Aiello*—both factually and jurisdictionally—and the *Aiello* Court's own recognition that some pregnancy classifications *would* violate the Fourteenth Amendment, the argument that it has definitely disposed of this issue of sex discrimination for the case at bar cannot be sustained.

2. The language relied upon by Long Lines for its conclusion that *Aiello* held that exclusion of pregnancy from coverage under a disability benefits plan does not constitute discrimination on the basis of sex is *not* part of the analysis used by the Supreme Court to determine that the exclusion was rational and non-invidious, *Satty* v. *Nashville Gas Co.*, *supra*, slip opinion, pp. 6-7, but rather *follows* the Court's conclusion in that regard. Having found exclusion of pregnancy justified by the legislature's policy objectives, the majority examined the plan as it existed to note that its present operation was non-discriminatory with regard to the risks which were included. Nothing involved in the analysis of risks included concerns the Court's earlier determination that the exclusion of pregnancy had been justified by reasonable policy objectives. Long Lines is thus erroneously attempting to use language relating to the non-discriminatory operation of risks insured under the California program as part of the Supreme Court's analysis of a risk excluded from the program which had already

10. *Satty* did not involve income protection payments because the employer's policy was to permit disabled employees to accumulate "sick leave" and retain seniority during their absence. Only in the case of women disabled by pregnancy was sick leave and accumulated seniority denied.

been found justified by rationally supported and legitimate legislative interests.[11]

Moreover, assuming, *arguendo*, that the Court's analysis of the constitutionality of a disability excluded from the insurance program could have resulted from examining the disabilities included, the sweeping employment practices involved here are neither related to nor justifiable by references to "aggregate risk protection," as used by the Court in *Aiello* to assess covered disabilities. It is difficult to see *any* relationship between concepts of aggregate risk protection and the denial or diminution of seniority, wage progression credit or vacation entitlement. Raises, promotions and transfers are unaffected for all disabled workers at Long Lines except women disabled by pregnancy. Lay-off or termination of employment is not a threat to disabled male employees. Thus, using the *Aiello* Court's own measuring device for the validity of the plan's covered disabilities, it is *not* possible here to say that disabled men and women receive equal treatement by Long Lines in its disability benefits policies. Women disabled by pregnancy find themselves at a significant competitive disadvantage due to the loss of seniority, wage progression credit and threat of termination. Title VII is specifically addressed to limitations upon competitive equality in the job market as well as to economic equality in the form of monetary payments. See, NYCL Brief, pp. 10-15; *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385, 386-387 (5th Cir., 1971), *cert. den.* 404 U.S. 950 (1971). The

11. As pointed out persuasively in the IUE Brief, pp. 16-18, Long Lines' objectives in providing disabled employees with benefits, including income protection payments, are quite different and are related specifically to the employer's effort to attract employees, and to keep them satisfied and encourage their continued, productive relationship to the company. *Cf. Rogers* v. *Equal Employment Opportunity Commission*, 454 F. 2d 234, 238-239 (5th Cir., 1971), *cert. den.* 406 U.S. 957 (1972).

substantial restrictions imposed upon women disabled by pregnancy are unrelated to risk protection of any kind; disabled men are not subject to these restrictions. The contention that *Aiello* concluded that pregnancy classifications were not sex discrimination is incorrect; the suggestion that such a conclusion, if it had been made, could apply to Long Lines' employment policies is wishful thinking at best.

POINT II

Long Lines has misconceived prior court decisions in attempting to justify an extension of *Aiello* to the facts of this Title VII case.

1. Long Lines argues that the "logic" of the *Aiello* decision makes it applicable to this Title VII case involving employment practices, adopting the reasoning of the Court below that if the pregnancy classifications in *Aiello* were not sex discrimination, then the Supreme Court has disposed of every case involving pregnancy classifications (absent pretext), no matter how different in facts, justifications or jurisdiction. As noted at pp. 9-21 of Appellants' Brief, the "logic" of *Aiello* is not nearly so clear or sweeping. Long Lines asserts that the test of determining unlawful sex discrimination is no different under Title VII than the Fourteenth Amendment, stating that no case has held that this "threshold question" must be viewed in a different light under Title VII than under the Amendment (Long Lines Brief, p. 8). However, this ignores the fact that *no* case arising in the *employment* area has ever held that classifications based on pregnancy were anything other than sex-based (See Appellants' Brief, pp. 16-17). Two District Courts have now specifically held that this threshold question under Title VII is affirmatively answered, *Aiello* notwithstanding. *Vineyard* v. *Hollister School District, supra,*

8 FEP cases at 1012; *Satty* v. *Nashville Gas Company*, *supra*, slip opinion, pp. 5-11.

2. Long Lines misconceives the impact of this Court's decision in *Chance* v. *Board of Examiners*, 458 F. 2d 1167 (2d Cir. 1972), in implying therefrom that the same standards of justification are to be applied under Title VII and under the Fourteenth Amendment. Long Lines' error is in failing to recognize that under differing circumstances different standards of justification are operative under the Fourteenth Amendment.[12]

When *Chance* is considered with the subsequent decisions of *Vulcan Society* v. *Civil Service Commission*, 490 F. 2d 387 (2d Cir. 1973) and *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F. 2d 1333 (2d Cir. 1973), it is clear that the principles there enunciated by this Circuit recognize that the "rationally supportable" reasonable basis standard applied in *Aiello*, 94 S. Ct. at 2491, is different from the Title VII standards[13] approvingly referred to and utilized in *Chance*, *Vulcan Society* and *Bridgeport Guardians*.

Faced with the *sui generis* situation of public employment tests where the classification is not made by the municipal body but results from the testing device, *Bridgeport Guardians*, *supra*, 482 F. 2d at 1337, this Circuit refined and developed principles which make it unnecessary to determine whether the constitutional obligation of the municipal body is tested against the rational basis standard

12. See: *San Antonio Independent School District* v. *Rodriguez* 411 U.S. 1, 16-17 (1973) (reasonable basis and strict scrutiny standards); "Developments in the Law—Equal Protection," 82 *Harvard Law Review* 1065 (1969); *cf. Scott* v. *Opelika City Schools*, 8 FEP Cases 272, 274-275 (M.D. Ala. 1974).

13. Judge Knapp recognized that the deference given by the Supreme Court in *Aiello* to California's social welfare legislative decision would not apply to a Title VII case where no such deference is required (9a).

or the strict scrutiny standard. *Bridgeport Guardians, id.; Kirkland* v. *New York State Dept. of Correctional Services*, 374 F. Supp. 1361, 1366 (S.D.N.Y. 1974). In defining and developing the manner in which this unique situation should be treated, the Court has referred to and utilized the statements in Title VII cases which impose upon the employer the burden of coming forward with "convincing facts establishing a fit between the qualification and the job" or establishing a demonstrable relationship between the employment test and successful performance of the job. *Vulcan Society, supra*, 490 F. 2d at 393-394; *Bridgeport Guardians, supra*, 482 F. 2d at 1337.

While the standard utilized in *Chance* and its progency remains unlabeled, it is surely clear that that standard is different from the usual reasonable basis approach applied generally in social welfare cases and specifically in *Aiello*. It is difficult to perceive how the recognition by this Court of Title VII authorities in developing a Fourteenth Amendment standard distinctive from reasonable basis can be urged as an argument that Title VII cases involving pregnancy are subject to the reasonable basis standard of *Aiello*.

In *Vineyard* v. *Hollister School District, supra*, 8 FEP at 1012, the Court specifically held that it would not follow the *Aiello* standard and applied instead the Title VII approach:

> ... this case presents a different analytical framework than the Fourteenth Amendment claims that confronted the Court in Geduldig. In the instant case, plaintiff has relied on Title VII of the Civil Rights Act (42 U.S.C. § 2000e, et seq.). Title VII is a congressional enactment that addresses the problems of employment discrimination based on sex and race more specifically than the broad mandate of the Equal Protection Clause of the Fourteenth Amendment. Under Section 5 of the Fourteenth Amend-

> ment, Congress has the power to pass appropriate legislation to implement the dictates of the Equal Protection Clause. The implementing legislation may reach more broadly than the Equal Protection Clause itself (Katzenbach v. Morgan, 384 U.S. 641 (1966)). Congress intended Title VII to be just such a broad implementing legislation. *In a Title VII case, the Court does not need to go through the balancing process followed by the Supreme Court in Geduldig.* Under the Title VII and the E.E.O.C. Guidelines which accompany it (29 C.F.R. § 1604.10 (b)) treating pregnancy differently from other temporary disabilities is discriminatory and flatly prohibited. (emphasis added)

Similarly, in *Satty* v. *Nashville Gas Company, supra,* the Court recognized that the Equal Protection Clause reasonable basis standard applied in *Aiello* did not apply to Title VII:

> *All sex discrimination cases do not fall within the same category.* As this discussion has illustrated, *there are at least two classifications of sex discrimination cases: those arising under the Equal Protection Clause of the Fourteenth Amendment and those arising under Title VII of the Civil Rights Act of 1964.* These two categories involve the application of different standards for the determination of whether distinctions based on sex are permissible. Under the Equal Protection Clause there need be only a "reasonable basis" for the legislative determination. However, under the Civil Rights Act of 1964, there must be an actual business necessity for employment policies that discriminate on the basis of sex. See *Moody* v. *Albemarle Paper Co.*, 474 F. 2d 134 (4th Cir. 1973); *Diaz* v. *Pan American*

World Airways, Inc., 442 F. 2d 385 (5th Cir., 1971); *Williams* v. *American St. Gobain Corp.*, 447 F. 2d 561 (10th Cir. 1971).

The *Geduldig* case was brought under the Equal Protection Clause and not under Title VII. Thus, the standard involved was one of legislative reasonableness. Since *Geduldig* was not an employment case, it would be improper to draw a negative inference as to the power of Congress to establish a different standard of permissible discrimination for employers admittedly affecting interstate commerce.[14] (emphasis added)

The attempt to use this Court's statement in *Chance*, *supra*, that "it would be anomalous at best" if a less stringent standard were applied to a public employer than to a private employer is entirely misplaced. *Aiello* involved

14. In a footnote to the above-quoted statement the Court declared:

"In *Geduldig* the minority opinion indicates a willingness to impose the congressional standard manifest in Title VII as the appropriate test under the Equal Protection Clause. The minority opinion further indicates a willingness to find State classifications based on sex to be unconstitutional *per se*. However, the majority opinion expressly relies on the "rational basis" formula as set forth in the traditional line of cases under the Equal Protection Clause. The dispute within the Court in *Geduldig* does not appear to be whether California's statute discriminates on the basis of sex, but rather the dispute focuses on whether that discrimination is permissible under the Fourteenth Amendment, i.e., it is a question of legislative reasonableness. The dissenting opinion ultimately rests on the conclusion that the State lacked a rational basis for the distinctions drawn. References to the provisions of Title VII and Equal Employment Commission decisions and regulations by the minority appear to furnish fuel for the proposition that the standard of reasonableness under the Equal Protection Clause should be strengthened to conform with the congressional statement of policy. Rejection of that argument by the majority does not rationally suggest that the standard established under Title VII is weekened or in anyway diminished in a case properly brought under the Civil Rights Act of 1964."

neither public employers nor the employment relationship. Therefore, application of the Title VII standard of business necessity herein would *not* create a difference in treatment between public and private employers. On the contrary, with the 1972 Amendment extending Title VII to governmental employers, the same statutory standard applies to both public and private employers. Moreover, it is the application of *Aiello* to the employment relationship which will create a real anomaly, rather than avoid the synthetic one Long Lines attempts to construct. To apply *Aiello* to this Title VII case would mean that employers who pursued practices concerning pregnancy such as those herein, would be in compliance with the federal law but in violation of New York's Human Rights Law, Executive Law, Art. 15, §290, *et seq.* Instead of the parallel development of Title VII and the comparable state fair employment practices laws concerning the same employment practices and relationships, there would be conflicting statutory treatment. See Human Rights Brief, pp. 2-5; *Union Free School District* v. *New York State Human Rights Appeal Board*, — N.Y. 2d — (Decided, November 21, 1974).

3. Long Lines takes the position that *Aiello's* "logic" also applies to employment practices under Title VII because it is consistent with previous rulings holding that sex discrimination exists only where similarly situated individuals are treated differently, citing *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1972) and *Sprogis* v. *United Airlines*, 444 F. 2d 1194 (7th Cir., 1971), *cert. den.*, 404 U.S. 991 (1971). Long Lines argues that *Aiello* recognized the uniqueness of pregnancy and, in so doing, held that pregnant women are not "similarly situated" (Long Lines Brief, pp. 14-16) for purposes of Title VII application.[15]

15. The Airlines' Brief makes a similar argument at pp. 15-19, relying, in addition, upon *Rafford* v. *Randle Eastern Ambulance Service*, 348 F. Supp. 316 (S.D. Fla. 1973) holding that men with

(Footnote continued on next page)

This analysis, however, misses the point. Long Lines' error is in confining its analysis to the particular distinction rather than the context in which the distinction is made. Obviously, only women become pregnant, but both men and women become *disabled.* The distinctive treatment challenged here involves a group of women disabled by pregnancy. Thus, men and women *are* similarly situated—both become disabled and unable to work. Disability is admittedly the critical factor in determining whether benefits under the company's disability plan will be paid (Appellants' Brief, pp. 5-6). Pregnancy *is* unique to women; hemophilia *is* unique to men; sickle-cell anemia *is* unique to blacks; Tay-Sachs Disease *is* unique to European Jews. These conditions are *disabling.* It is this common fact of disability which makes *Phillips, Sprogis,* and *Doe* v. *Osteopathic Hospital of Wichita, Inc.,* 333 F. Supp. 1357 (D. Kan. 1971), controlling here. Long Lines has nevertheless determined that one group of disabled employees—all women—will be penalized for their inability to work, not only by loss of income protection benefits, but by loss of all the other rights, incentives and privileges of employment

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(Footnote continued from previous page)

beards were a "unique" class and that an employer requirement that employees be clean shaven did not constitute proscribed sex discrimination. Congressional interest in eradicating all forms of stereotyped, disparate treatment through Title VII did not focus on bearded men. It did, however, focus on the vast economic barriers facing women due to precisely the type of unenlightened attitude demonstrated by the Airlines herein. No one seriously contends that the pervasive, disparate treatment of women in the job market because of their childbearing function (see, e.g., EEOC Brief, pp. 9-14; Bellamy Brief, pp. 15-18; NYCL Brief, pp. 8-13; Appellants' Brief, pp. 4-9, 24-25, 33-37) can be compared to decisions by some male employees to grow beards or mustaches. The Airlines' Brief is replete with condescending, gratuitous remarks and arguments about women disabled by pregnancy which demonstrate their failure to grasp the seriousness of this issue (see, e.g., pp. 18, 33-34).

which affect an employees' future relationship to the company.[16]

In addition, "uniqueness" has never prevented courts from closely examining and striking down discriminatory classifications based upon a "unique" condition. Blacks were the unique offspring of freedmen who had been slaves, yet "grandfather clauses" which prevented them from voting were found unconstitutional. See, e.g., *Guinn* v. *United States*, 238 U.S. 347 (1915).[17]

Long Lines suggests (Brief, p. 15) that pregnancy's uniqueness is further demonstrated because of its "multiple effects on the employment relationship," stating that "no other condition approaches it in terms of voluntariness, anticipated cost of coverage and the rate of non-return to employment." It is clear, however, that *no* facts are present in the record to support these contentions, even assuming, *arguendo*, that any or all would meet the strict "business necessity" standard of justification under Title VII. (Appellants' Brief, pp. 37-40; EEOC Brief, pp. 19-20) The record herein merely shows that one class of disabled employees—pregnant women—are denied income protection, full insurance protection, service credit, transfer and promotion credit, equal vacation eligibility, and freedom from lay-offs and terminations. Disabled men, no matter

16. As many *amici* have pointed out, these policies substantially lessen desire and ability to return to work following childbirth. (See, especially, IUE Brief, pp. 16-18; NYCL Brief, pp. 14-15).

17. As pointed out in the NYCL Brief (pp. 31-32), it is doubtful that a specific exclusion of sickle-cell anemia from California's insurance program could not have been considered race-related. However, the Supreme Court's failure to consider sex-based classifications as "suspect" as racial classifications in the Fourteenth Amendment context accounts for its deference to California's legislative objectives. Title VII, on the other hand, subjects racial and sexual classifications to equal scrutiny.

how unique, voluntary, or expensive their disability, nor how likely they may be to fail to return to work, suffer none of these limitations. Long Lines may thus cover some disabilities on the same terms and conditions as others, but it does not treat all disabled employees alike.[18]

POINT III

The EEOC Guidelines are factually based, consistent with congressional intent and correct.

Appellants believe that the rules regarding deference to be accorded the EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604.10, and the applicability of those Guidelines to a determination of this issue have been adequately presented to this Court. See Appellants' Brief, pp. 29-32; IUE Brief, pp. 9-22; NYCL Brief, pp. 33-47; Bellamy Brief, pp. 18-22; EEOC Brief pp. 27-30).[19] However, Long Lines suggests that the present Guidelines are "wrong" and therefore did not qualify for consideration by the Court below in holding Long Lines' treatment of pregnancy governed by *Aiello* (Long Lines Brief, pp. 17, 19-22).

1. Neither Appellants, nor the EEOC, contend that § 1604.10 was contemporaneous with Title VII's enactment.

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18. Long Lines' characterization (Brief, p. 16) of Appellants' disparate effect argument (Appellants' Brief, pp. 33-37) is not only inaccurate, it misses the point entirely. Disparate effect is shown here in the following manner: (1) fundamental terms and conditions of employment are denied to women disabled by pregnancy, although granted to men disabled by any cause, and (2) income protection benefits are denied to a sub-class of employees already burdened by present and past wage discrimination. Appellants have never contended that employers may lawfully refuse to cover only disabilities equally experienced by protected groups.

19. As the Human Rights Brief clearly demonstrates, the EEOC is not alone in its determination that disparate treatment of women disabled by pregnancy is sex discrimination prohibited by fair employment legislation, pp. 3-5, 11-12.

However, consistent with its investigative and analytical role in determining prohibited employment practices under Title VII, *Rogers* v. *Equal Employment Opportunity Commission*, *supra*, 454 F. 2d at 238, the EEOC ascertained the discriminatory impact of employer policies which limit the rights and benefits of women because of their childbearing function.[20] Numerous studies and analyses by private and governmental bodies have also demonstrated that disparate treatment of women because they may become or are pregnant may be the single most serious barrier to their attainment of full equality in the working world. See, e.g., Citizens Council on the Status of Women, "Job-Related Maternity Benefits" (1970); Women's Bureau, U.S. Dept. of Labor, *The Myth and the Realty* (April, 1974); Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 *N.Y.L. Forum* 480 (1971); Cary, "Pregnancy Without Penalty," 1 *Civ. Lib. Rev.* 31 (1974); Hayden, "Punishing Pregnancy: Discrimination in Education, Employment and Credit," Women Rights Project, American Civil Liberties Union (October, 1973), pp. 21-63. Consequently, it cannot reasonably be argued that the EEOC Guidelines were without any factual basis or inconsistent with the purposes of Title VII.

Indeed, the "uniqueness" of pregnancy set forth in the 1966 opinion of EEOC's General Counsel is no basis upon which to conclude that the years of study which followed

20. EEOC's Task Force which investigated Bell System employment practices for almost one year, resulting in the report referred to in Appellants' Brief as the "Copus Report," and FCC testimony in this area provided a clear insight into the adverse impact of such policies on the very employees whose rights are now in issue here. (See 185a-288a, esp. 280a-283a; *cf.* 143a-152a) The FCC Proceedings, Docket No. 19143, demonstrate clearly that this area was not part of the subsequent Consent Decree because the parties intended that it be resolved through litigation such as this (T. 8175-8176).

did not authoritatively indicate that working women should not be disadvantaged by such a pretext. The Opinion of 1966 did *not* state that differential treatment of pregnancy was not sex discrimination. (*Cf.* Long Lines Brief, p. 19)

2. Long Lines also suggests that 1970 Office of Federal Contract Compliance ("OFCC") Guidelines, 41 C.F.R. § 60-20.3, demonstrate conflicting governmental positions on pregnancy. However, despite the gratuitous suggestion that the OFCC, admittedly considering Guidelines similar to EEOC's on this issue (118a-119a), will not issue them in light of *Aiello*, Long Lines cannot overlook the fact that the agency believes it may have to require federal contractors to cease any disparate treatment of women disabled by pregnancy, and is still considering and receiving data on the issue. Similarly, the Wage and Hour Administrator's 1966 interpretation of the Equal Pay Act, 29 U.S.C. § 206(d), stating that maternity benefits "do not constitute remuneration for employment and are, therefore, beyond the scope of equal pay provisions" does not alter the fact that such benefits *are* within the scope of Title VII. In addition, as noted in the IUE Brief, pp. 28-33, attempts during the Equal Pay Act debates to permit lesser wages for women because maternity benefits cost more was soundly rejected, and there is no question that attempts to disadvantage women because they may bear children do not have Congressional approval.[21] Thus, Long Lines has failed to show the type of *Congressional* conflict or inconsistency in intent which the Supreme

21. Indeed, Congressional intent on treatment of women disabled by pregnancy was directly expressed in the only temporary disability legislation it has enacted. The Railroad Unemployment Insurance Act. 45 U.S.C. 351(k)(2) provides:

> [A] 'day of sickness', with respect to any employee means a calendar day on which because of any physical, mental, psychological or nervous injury, illness, sickness, or disease he is not able to work, or with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health. . . .

Court found present in the case of citizenship requirements considered in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973) to require rejection of an EEOC Guideline on that subject.

3. The several Courts which have considered the applicability of § 1604.10 to issues of disparate treatment of women disabled by pregnancy have concluded that the Guideline is entitled to deference. *Gilbert* v. *General Electric, supra*, 375 F. Supp. at 381; *Wetzel* v. *Liberty Mutual Ins. Co., supra*, 372 F. Supp. at 1159; *Hutchison* v. *Lake Oswego School Dist.*, 374 F. Supp. 1056, 1060 (D. Ore., 1974); *Vineyard* v. *Hollister School Dist., supra*, 8 FEP cases at 1012. This Circuit took a similar view of these very Guidelines in *Green* v. *Waterford Board of Education*, 473 F. 2d 629, 637, n. 19 (2d Cir., 1973). Additionally, this Circuit has recognized the broad principles of deference to be afforded EEOC Guidelines in *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Comm., supra*, 482 F. 2d at 1337, n. 6; and *Vulcan Society* v. *Civil Service Comm., supra*, 490 F. 2d at 394, n. 8; *Kirkland* v. *New York State Dept. of Correctional Services, supra*, 374 F. Supp. at 1371.[22] Accordingly, Appellants contend that an

22. Both the Long Lines' Brief, p. 20, and the Airlines' Brief, pp. 26-27, make much of one district court's rejection of § 1604.10, *Newmon* v. *Delta Airlines*, 374 F. Supp. 238 (N.D. Ga. 1973). The *Newmon* decision, however, failed to comprehend the fact that the Guidelines mandate equal treatment for *disabled* employees, including pregnant women, rather than payment of benefits for pregnancy *per se*. Consequently it was apparently believed that the plaintiff sought benefits payments for the entire duration of her pregnancy and that the Guidelines required such a result. There is no question here that equal treatment of women disabled by pregnancy is sought for the time they are, in fact, *disabled* and not for time they may be absent from work due to child care (or because they have felt compelled to comply with Long Lines' apparent requirement that they commence maternity leave by the seventh month of pregnancy). Compare, for example, the *Newmon* court statement that "pregnancy is not sickness in the usual sense of the word", 374 F. Supp. at 246,

(Footnote continued on next page)

adequate, and indeed persuasive, factual basis exists for giving deference to § 1604.10. The Court below should not have ignored the EEOC Guidelines in relying upon *Aiello* as dispositive of this case.[23]

CONCLUSION

For all the reasons stated herein and in appellants' principal brief, it is respectfully submitted that the order of the District Court should be reversed.

Respectfully submitted,

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(Footnote continued from previous page)
with the *Gilbert* court's finding that pregnancy is "normally disabling for a period of six to eight weeks," 375 F. Supp. at 374-377. *Newmon* is not only in the minority in its view of this issue, but it misperceived the thrust of the argument by thinking that pregnancy *qua* pregnancy required special treatment.

23. The suggestion in the Airlines' Brief at pp. 26-27 that the Guidelines represented the "personal view" of two or three EEOC attorneys, but somehow became EEOC policy, is shocking. Not only does the Airlines demean the interpretive and investigative role of that agency by suggesting that the personal opinions of its staff members can easily become administrative policy, but it also ignores the relationship between sex discrimination in employment and differential treatment of women disabled by pregnancy which has been identified by EEOC and other bodies studying this very problem. The Airlines' argument is frivolous and offensive both to working women and to conscientious staff members and attorneys of the EEOC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
ESTHER SKIPPER, Individually and on Behalf
of All Similarly Situated Non-Supervisory
Female Employees of American Telephone and
Telegraph Company, Long Lines Department,

Plaintiffs-Appellants,

against

No. 74-2191

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT,

Defendant-Appellee.

On Appeal From The United States District
Court For the Southern District of New York

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

LOUIS MARK, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 29th day of November 1974 he served two copies of the attached Reply Brief of Plaintiffs-Appellants on each of the following named by enclosing sa id copies in fully postpaid wrappers addressed as follows and depositing same in The United States Post Office maintained at No. 150 Christopher Street, New York City, New York.

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Louis Mark

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Sworn to before me this
29th day of November 1974